DAVID R. EBERHART (S.B. #195474)
deberhart@omm.com
SHARON M. BUNZEL (S.B. #181609)
sbunzel@omm.com
COLLEEN M. KENNEDY (S.B. #227107)
ckennedy@omm.com
O'MELVENY & MYERS LLP
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111
Telephone: (415) 984-8700
Facsimile: (415) 984-8701

Attorneys for Plaintiff eBay Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EBAY INC.,

Plaintiff,

v.

DIGITAL POINT SOLUTIONS, INC., SHAWN HOGAN, KESSLER'S FLYING CIRCUS, THUNDERWOOD HOLDINGS, INC., TODD DUNNING, DUNNING ENTERPRISES, INC., BRIAN DUNNING, BRIANDUNNING.COM, and DOES 1-20,

Defendants.

Case No. C 08-04052 JF

DECLARATION OF COLLEEN M. KENNEDY IN SUPPORT OF EBAY INC.'S CONSOLIDATED OPPOSITION TO (1) THE MOTIONS TO DISMISS THE SECOND AMENDED COMPLAINT BY DEFENDANTS DIGITAL POINT SOLUTIONS, INC., SHAWN HOGAN, THUNDERWOOD HOLDINGS, INC., KESSLER'S FLYING CIRCUS, BRIAN DUNNING, BRIANDUNNING.COM, TODD DUNNING, AND DUNNING ENTERPRISE, INC. ; AND (2) THE MOTIONS TO TRANSFER BY DEFENDANTS DIGITAL POINT SOLUTIONS, INC., SHAWN HOGAN, TODD DUNNING AND DUNNING ENTERPRISE, INC.

Hearing Date: June 26, 2009
Time: 9:00 a.m.
Judge: Hon. Jeremy Fogel

Dockets.Justia.com

I, Colleen M. Kennedy, declare:

1. I am a member of the Bar of the State of California and am associated with the law firm of O'Melveny & Myers LLP, counsel of record for Plaintiff eBay Inc. ("eBay"). I submit this declaration in support of eBay's Consolidated Opposition to the Motions to Dismiss the Second Amended Complaint by Defendants Digital Point Solutions, Inc. and Shawn Hogan (collectively, the "DPS Defendants"); Thunderwood Holdings, Inc., Kessler's Flying Circus ("KFC"), Brian Dunning, and briandunning.com (collectively, the "KFC Defendants"); Todd Dunning and Dunning Enterprise, Inc. (collectively, the "TD Defendants"); and the Motions to Transfer by the DPS Defendants and the TD Defendants. I have personal knowledge of the facts set forth in this declaration and, if called to testify as a witness, could and would do so competently.

2. Defendants' motions raise a number of factual issues inappropriate to a motion to dismiss. Even if the Court chose to convert any of Defendants' motions to a motion for summary judgment, discovery would be required on a number of facts essential to any summary judgment ruling. A summary judgment ruling on the issues raised by Defendants would require resolution of at least the following disputed factual issues:

a. There is a factual dispute regarding the existence and terms of any binding agreement between Defendants and Commission Junction, Inc. ("CJ"). Specifically, there are unresolved questions of fact regarding: (1) whether any binding agreement was ever entered into between any Defendant and CJ; (2) which Defendants entered into such binding agreements, if any; (3) when any such binding agreements were executed; and (4) the terms of any such binding agreements. There is likely to be evidence controverting Defendants' statements on these issues in light of the inconsistent positions Defendants have taken in this litigation and in their separate litigation with CJ (the "CJ Action"), as discussed in eBay's Consolidated Opposition to Defendants' Motions to Dismiss and Motions to Transfer ("Opposition").

b. There is a factual dispute regarding whether, to the extent any binding Publisher Service Agreement ("PSA") existed between any of the Defendants and CJ that contained a contractual limitations provision triggered by termination of the PSA, such termination ever occurred. There is also a dispute of fact as to when any such termination occurred, if it did. There is likely to be evidence controverting Defendants' statements on these issues in light of the inconsistent positions Defendants have taken in this litigation and in the CJ Action, as discussed in eBay's Opposition.

c. There is a factual dispute regarding whether CJ had any authority to release the claims asserted by eBay in this litigation through the agreement it entered into with the KFC and TD Defendants to settle the CJ Action. Specifically, there are unresolved questions of fact regarding: (1) whether any agreement exists that expressly creates an agency relationship between CJ and eBay for purposes of litigation; (2) whether eBay asserted any control over CJ during the course of the prosecution and settlement of the CJ Action; (3) whether CJ representatives believed CJ was acting as eBay's agent for purposes of the settlement; (4) whether Defendants believed that CJ was acting as eBay's agent for purposes of the settlement; (5) whether any such belief was reasonable under the circumstances; (6) whether any such belief was caused by some act or neglect by eBay; (7) whether Defendants investigated the scope of CJ's authority in connection with the settlement; (8) whether eBay's claims were discussed during the negotiation of the settlement agreement; (9) whether CJ made any representations about its authority to release eBay's claims; and (10) whether the parties intended CJ's release of its claims to release eBay's claims as well. There is likely to be controverted evidence on these issues in light of the facts known to eBay and the positions taken in Defendants' motions.

d. There is a factual dispute regarding the diligence of eBay's inquiry into Defendants' fraudulent schemes and, to the extent Defendants claim that eBay was unreasonable in relying on Defendants' fraudulent representations, the reasonableness of eBay's reliance thereon. Specifically, there are unresolved questions of fact regarding: (1) the investigation and other actions taken by eBay in response to various statements regarding Defendants' fraudulent schemes; (2) the difficulty of detecting such schemes;

(3) the technological and other methods used by Defendants to conceal their schemes; and (4) the nature of the analysis undertaken by eBay that ultimately uncovered Defendants' schemes. There is likely to be controverted evidence on these issues in light of the facts known to eBay and the positions taken in Defendants' motions.

3. Many of the facts relevant to these factual disputes are in the exclusive knowledge of Defendants and third parties, including facts related to any agreement between Defendants and CJ, the termination of any such agreement, statements made during the negotiation of the settlement of the CJ Action, and the nature of Defendants' technological methods.

4. Discovery regarding the above-listed disputed factual issues has not been completed for a number of reasons, most within Defendants' control. First, several of these factual issues were raised for the first time in Defendants' recent motions to dismiss and were unanticipated by eBay, including issues related to the purported termination of the PSA and the settlement agreement between Defendants and CJ. Second, in response to the discovery propounded by eBay to date, Defendants have asserted their Fifth Amendment rights against self-incrimination and have also contended that the documents responsive to eBay's requests are in the possession of the FBI and therefore unavailable. Because Defendants have asserted their Fifth Amendment rights, because the TD and KFC Defendants refused to provide testimony in the CJ Action based upon their Fifth Amendment rights, and because certain of the Defendants have indicated their intention to seek a stay of this action pending the resolution of the criminal investigation against them, eBay expects that Defendants will continue to refuse to provide discovery responses, including deposition testimony, on any subject until that investigation has concluded. Third, discovery has not been completed in this action and is not currently scheduled to be completed until November 20, 2009.

5. Attached hereto as Exhibit 1 is a true and correct copy of the Joint Trial Brief filed by the TD and KFC Defendants in the CJ Action, dated March 6, 2009.

6. Attached hereto as Exhibit 2 is a true and correct copy of eBay's Requests

for Production to Digital Point Solutions, Inc., dated January 22, 2009.

7. Attached hereto as Exhibit 3 is a true and correct copy of KFC's Responses to eBay's First Set of Requests for Production, dated February 25, 2009.

8. Attached hereto as Exhibit 4 is a true and correct copy of Thunderwood Holdings, Inc.'s Responses to eBay's First Set of Requests for Production, dated February 26, 2009.

9. Attached hereto as Exhibit 5 is a true and correct copy of BrianDunning.com's Responses to eBay's First Set of Requests for Production, dated February 26, 2009.

10. Attached hereto as Exhibit 6 is a true and correct copy of Dunning Enterprises, Inc.'s Responses to eBay's First Set of Requests for Production, dated February 26, 2009.

11. Attached hereto as Exhibit 7 is a true and correct copy of Brian Dunning's Responses to eBay's First Set of Requests for Production, dated February 26, 2009.

12. Attached hereto as Exhibit 8 is a true and correct copy of T. Dunning's Responses to eBay's First Set of Requests for Production, dated February 26, 2009.

13. Attached hereto as Exhibit 9 is a true and correct copy of Shaw Hogan's Responses to eBay's First Set of Requests for Production, March 12, 2009.

14. Attached hereto as Exhibit 10 is a true and correct copy of Digital Point Solutions, Inc.'s Responses to eBay's First Set of Requests for Production, dated March 12, 2009.

15. Attached hereto as Exhibit 11 is a true and correct copy of KFC's Responses to eBay's First Set of Requests for Admission, February 25, 2009.

16. Attached hereto as Exhibit 12 is a true and correct copy of Digital Point Solutions, Inc.'s Responses to eBay's First Set of Requests for Admission, dated March 12, 2009.

17. Attached hereto as Exhibit 13 is a true and correct copy of KFC's Responses to CJ's Requests for Production in the CJ Action, dated March 13, 2008.

18. Attached hereto as Exhibit 14 is a true and correct copy of Todd Dunning's Responses to CJ's Requests for Production, dated March 13, 2009.

19. Attached hereto as Exhibit 15 is a true and correct copy of the Cross-Complaint filed by KFC against CJ in the CJ Action, dated July 25, 2008.

20. Attached hereto as Exhibit 16 is a true and correct copy of eBay's Subpoena to CJ to Produce Documents, dated May 4, 2009.

21. Attached hereto as Exhibit 17 is a true and correct copy of eBay's Subpoena to Ernster Law Offices to Produce Documents, dated May 4, 2009.

22. Attached hereto as Exhibit 18 is a true and correct copy of the TD Defendants Motion to Dismiss eBay's First Amended Complaint, dated October 27, 2008.

23. Attached hereto as Exhibit 19 is a true and correct copy of the Master Services Agreement between eBay and CJ, effective January 1, 2006.

24. Attached hereto as Exhibit 20 is a true and correct copy of Defendants KFC and Todd Dunning's Memorandum of Points and Authorities in Support of Motion to Transfer Venue to Orange County in the CJ Action, dated October 25, 2007.

25. Attached hereto as Exhibit 21 is a true and correct copy of Plaintiff eBay Inc.'s Initial Disclosures Pursuant to Rule 26 in this action, dated January 8, 2009.

26. Attached hereto as Exhibit 22 is Plaintiff eBay, Inc.'s Amended Initial Disclosures Pursuant to Rule 26 in this action, dated April 2, 2009.

27. Attached hereto as Exhibit 23 is a true and correct copy of the Consolidated Initial Disclosures of the TD and KFC Defendants, dated January 8, 2009.

28. Attached hereto as Exhibit 24 is a true and correct copy of the DPS Defendants' Initial Disclosures in this action, dated January 8, 2009.

29. Attached hereto as Exhibit 25 is a true and correct copy of the DPS Defendants' Supplemental Initial Disclosures in this action, dated February 4, 2009.

30. Attached hereto as Exhibit 26 is a true and correct copy of the Commission Junction webpage as it appeared on June 4, 2009. (Available at http://www.cj.com/about/contact.html.)

31. Attached hereto as Exhibit 27 is a true and correct copy of the driving time as calculated by Google Maps between the DPS Defendants' residence at 8465 Regents Road, San Diego, California and the Federal Courthouse in the Western Division of the Central District of California at 312 North Spring Street in Los Angeles, California, as it appeared on June 4, 2009. (Available at http://maps.google.com.)

32. Attached hereto as Exhibit 28 is a true and correct copy of the driving time as calculated by Google Maps between the DPS Defendants' residence at 8465 Regents Road, San Diego, California and the Federal Courthouse in the Southern Division of the Central District of California at 411 West 4th Street, Santa Ana, California, as it appeared on June 4, 2009 (Available at http://maps.google.com.)

33. Attached hereto as Exhibit 29 is a true and correct copy of the driving time as calculated by Google Maps between the TD Defendants' residence at 1 Stockbridge, Aliso Viejo, California and the Federal Courthouse in the Western Division of the Central District of California at 312 North Spring Street in Los Angeles, California, as it appeared on June 4, 2009. (Available at http://maps.google.com.)

34. Attached hereto as Exhibit 30 is a true and correct copy of the driving time as calculated by Google Maps between the KFC Defendants' residence at 15 High Bluff, Laguna Nigel, California and the Federal Courthouse in the Western Division of the Central District of California at 312 North Spring Street in Los Angeles, California, as it appeared on June 4, 2009. (Available at http://maps.google.com.)

35. Attached hereto as Exhibit 31 is a true and correct copy of the flight time as calculated by Travelocity between San Diego, California and San Jose, California, as it appeared on June 4, 2009. (Available at http://www.travelocity.com.)

36. Attached hereto as Exhibit 32 is a true and correct copy of the flight time as calculated by Travelocity between Santa Ana, California and San Jose, California as it appeared on June 4, 2009. (Available at http://www.travelocity.com.)

37. Attached hereto as Exhibit 33 is a true and correct copy of the Deposition Subpoena for Production of Business Records served on eBay Inc., by CJ, dated March

12, 2008.

38. Attached hereto as Exhibit 34 is a true and correct copy of a letter from counsel for CJ to Christine Kim acknowledging Ms. Kim's appearance at trial pursuant to civil subpoena, dated March 2, 2009.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 5th day of June, 2009 at San Francisco, California.

/s/ Colleen M. Kennedy
Colleen M. Kennedy